Supreme Court, U.S.
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91-1465

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MANOJ KUMAR D. PATEL,
PETITIONER,

VERSUS

ROBERT MILGRAM, M.D.
RESPONDENT,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA EASTERN DISTRICT, PHILADELPHIA, PA.

MANOJ KUMAR PATEL,
3152, Kennedy Blvd.
Jersey City, N.J. 07306
Tel. 201-659-2409

Petitioner, Pro se.

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not, the trial court erred in failing to grant a mistrial when one juror, during the course of trial,became ill and was therefore relieved from jury service, and the trial judge failed to replace said juror,and violated appellent 's constitutional legal right to have a trial by panel of twelve jurors. ?.

2. Whether or not the jury was bias against petitioner-plaintiff due to nationality origin and jury was frustrated and confused by court's lack of facilities of courtroom for a trial and Jurors coerced to reach a verdict in favor of the defendent in prejudice against plaintiff?

3. Whether or not a trial Judge failed to give proper,legaland sufficient instructions to charge jury, for proper understanding, consideration and deliberation of testimony of witnesses and all evidemce

of documents and therefore the jury was unable to render a fair verdict in favor of petitioner although there is substantial evidence in support of claims.?.

4. Whether or not, a trial court erred in admitting the testimony of Dr. Carl Steindel, and Dr. Levinson, as it was an unethical and also ethical conflict of interest for these witnesses to testify due to their obligation to petitioner as their patient and due to their mutual friendship and professional associationship with the respondent, and also because the said two witnesses conspired with respondent and agreed to testify against petitioner at the instance of respondent and respondent's attorney Paul Barrett,Esq. afater a private conference with respondent prior to trial,and it was admitted by said two witnesses and respondent's attorney in a their cross examination at jury trial.?

5. Whether or not, a trial court erred when the trial court permitted the medical records of Dr. Steindel and Dr. Levinson to be introduced in evidence, although these medical records were not provided to the plaintiff prior the trial date and said medical records were false, illegal and baseless? The petitioner's legal right was seriously prejudiced and violated by the respondent and the it has caused a serious prejudice in minds of the jurors against the petitioner and his claims?.

6. Whether or not, the trial court erred in charging the jury when the trial judge failed to accept all the points of charges of the plaintiff and arbitrarily rejected some of the points, although those points were most relevant and essential in determination of plaintiff's claim in interest of justice and whether or not, the trial judge erred in making a jury wholly

improper, unclear, confusing,misleading the jury and it had a tendency to mislead and to confuse jury rather than to clarify the issues of facts and law to the jury.?

7. Whether or not, the trial court erred in giving a jury instructions which were harmful to petitioner,because the trial court failed to accept the point of Charge of CONTRIBUTORY NEGLIGENCE of respondent in causing injury and damages to petitioner and making the respondent liable for all damages caused to plaintiff according to the percentage of contributory negligence of the respondent as a defendent.?

8. Whether or not, a trial court erred in accepting a jury verdict slip which was prima facie illegal, improper and tampered, because it appears that some one erased it and corrected it, and it demonstrates that all jurors were not unanimous in deliberation of jury verdict, but some juros have

dominated other jurors against their free will and consent, to make jury verdict unanimous, and the trial court has failed to find out any appropriate reasons for said change and erase of verdict and also failed to setaside the said verdict.?

9. Whether or not, trial court erred in accepting jury verdict in which the jury determined that the respondent had been negligent, the jury failed to determine percentage of contributory negligence of of the respondent in causing injury and damages to the petitioner, and the jury simply determined that respondent's negligence was not substantial factor in bringing about about plaintiff's harm and damages.?

10. Whether or not, a trial court erred in asking a jury panel a question no.2:

" Was the defendent's negligence a substantial factor in bringing about the plaintiff's harm ? "

and /or a Question no. 2 as

" Was the defendent's negligence was a factor in bringing about plaintiff's harm" and if " yes" , What percentage of the defendent's contributory negligence was a factor in bringing about the plaintiff's harm and damages .?"

11. Whether or not, the trial court erred in denying to grant petitioner's motion for new trial, although one of the juror was found seriously sick and relieved from jury duty and the trial judge failed to replace said juror and the trial judge had failed to select an alternate juror to replace said sick juror and to cover up judicial serious error, the trial judge had insisted to continue a trial with eleven jurors, against the will of the petitioner, in violation of petitioner's constitutional legal rights and failed to grant a fair and impartial trial.?

12. Whether or not, trial court erred in refusing to declare a MISTRIAL and refusing a New Trial to petitioner.?

13. Whether or not, the petitioner's attorney was competent to protect all the legal rights and interest of petitioner, and Whether or not, the petitioner was provided adequate, effective and competent legal services by the petitioner's attorney to have fair, impartial and just trial,as the said attorney has failed to raise an objections against productions of medical records and medical testimony of Dr.Carl Steindel and Dr.Sander Levinson and allow the trial judge to go for trial in admiting in evidence, and also allowed the trial judge to go for a trial with eleven jurors and misguided the petitioner and failed to protect petitioner's constitutional legal rights to have a trial by twelve jurors. and failed to ask the judge to declare a MISTRIAL and grant a new trial in the interest of justice.?

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JURISDICTION

This matter was orignally decided on March 16, 1988 by jury verdict for a judgement in favor of the defendent-respondent, although the respondent was found negligent in medical professional practice by jury in Court of Common Pleas, Lackwana County, Scranton, Pa. The petitioner's motion for a new trial was also denied by the trial judge on June 15, 1989. It was then appealed to the Superior Court of Pennsylvania by Appeal No. 02794 Phila. 1989, which affirmed the judgement and jury verdict of the Court of Common Pleas of Lackwana County,Pa. on November 29,90. A petition for allowance of appeal was timely filed and treating this petition as petition for allowance of an appeal on December 27, 1990. By the permission of the Superior Court of Pennsylvania, a

a Corrected Petition for allowance of appeal was filed on February 4, 1991 in Supreme Court of Pennsylvania,for the Eastern District,by petition Docket No. 1118.E.D. Allocatur Docket 1990 which was denied on June 14,1991 along with denial of petitioner's motion to appoint Counsel and a petitioner's motion to Disqualify Defendent's Attorney. A petitioner's petition for Rehearing was timely filed on June 26,1991 in Supreme Court of Pennsylvania and it was denied on July 30 1991 and on August 22, 1991. The Supreme Court of Pennsylvania entered a final order denying petitioner's petition and motions on August 22,1991. A clerk of the Supreme Court has served this order dated August 22,91 bya mail to the petitioner.The petitioner therefore files this Writ of Certiorari in time of 90 days from the date of final order of the Supreme Court.

A jurisdiction in this Hon. Court lies pursuant to 28 USC 1254.

STATUTORY PROVISIONS INVOLVED

This is an action which involves a Title 28 USC Sections 1346(b), 2674 (Federal Tort Claims Act.), and a Pennsylvania Law of Tort and Negligence and it's related laws and acts and a Constitution Law of United States, and Civil Rights Act ofUSA and Equal Oppertunity and protection of law and Petitioner's Constitutional Rights to have jury trial by 12 jurors and to have a competent and effective Counsel/ attorney to represent in the judicial court of law, and Fraud Act of U.S.A.
The pertinent texts are set forth in the appendix.

STATEMENT OF THE CASE

This action arises out of personal injury claim filed on behalf of the petitioner against the respondent Dr. Robert Milgram, M.D. and others, pursuant to Pennsylvania Law of Torts and Negligence and it's related law. The evidence shows that in 1975 and 1976, the petitioner was under medical care of the respondent for an employment injury occurred on October 12,1975. The respondent Dr. Milgram neglected to provide any adequate medical treatment to cure this employment injury, and misdiagnosised the employment injury as a " Simple Sprain in Right Ankle" and gave a false and erroreneous medical opinion to an employer, that it will take 10 to 12 weeks time for this simple sprain to go away" and no medical treatment is necessary and refused to examine the petitioner or to provide any further medical

treatment to the petitioner. On or about December 30, 1975, the employment injury was more and more aggravated and the petitioner was unable to walk and to work on job. An employer then referred this petitioner to another Dr. Eisner for medical treatment of the same injury. The respondent neglected to furnish any medical records of this petitioner to this Dr.Eisner and the respondent also failed to give any written medical opinion and report to the petitioner regarding his diagnosis and his medical treatment. The respondent also neglected to obtain a medical records of the petitioner from an employer for evaluation of physical condition of the petitioner. The respondent failed to diagnosis Tuberculosis in petitioner's physical system at the initial examination of employment injury and the respondent misled the petitioner and

petitioner's employer into stating that the injury is a " Simple Sprain" and does not need any medical treatment. If the respondent might have asked for medical records and history of petitioner from an employer for a evaluation of physical condition of the petitioner, and the respondent should have provided antituberculosis medication to the petitioner immediately. Because of the respondent's negligence and failure to detect Tuberculosis and delay in providing antituberculosis medication,Tuberculosis focused on injured Right Ankle of this petitioner and this Tuberculosis flared up in the petitioner's Right Ankle due to delay in medical treatment of emlpoyment injury and which was aggravated by actual negligence of the respondent. Thereafter, the petitioner was referred to another physician Dr. Eisner on December 30,1975, who also neglected to avail medical records

and medical history of the petitioner from an employer and the respondent. Dr. Eisner poked a needle of " Sterroid-Cortisone " injection in petitioner's right ankle and this injection accellerated tuberculosis injection in petitioner's right ankle.Dr. Eisner was confused and worried about his medical treatment. Dr. Eisner then referred the petitioner to Dr. Carl Steindel on Feb. 3, 1976. Dr. Steindel also failed to avail medical records of the respondent Dr.Milgram and Dr. Eisner and medical history from an employer and begun a medical treatment and medical examination without providing any antituberculosis treatment, and Dr.Steindel and his associate Dr. Steinbach poked a " Mortine Injection" in Right ankle of the petitioner and this injection aggravated tuberculosis infection in right ankle of the petitioner. After four weeks Dr.Steindel also failed to know the real problems of injury.

On March 23,1976, Dr. Steindel certified that the petitioner was disabled to work and decided to admit the petitioner into C.M.C. Hospital at Scranton,Pa. for Operation on March 29, 1976. The petitioner was worried about this operation and it's consequences. To make sure that this operation is absolutely necessary, the petitioner again went to this respondent Dr.Robert Milgram and his associate Dr.Elihu Friedman for reexamination and second opinion regarding necessity of Operation. On March 26,76 the resppondent Dr. Milgram and his associate Dr. Friedman reexamined the petitioner and reviewed his medical records and again told to the petitioner that "No Operation is necessary and no medial tratment is required. " The respondent's medical opinion was absolutely false and errorneous and the respondent was absolutely negligent in his professionaal standards of treatment.

On March 29, 1976, Dr. Steindel performed an Operation and Surgery on petitioner's Right Ankle and on or about September 1976 Dr. Steindel obtained a laboratory test from C.M.C. Hospital, and found out by sai laboratory test result that :

" The Culture of petitioner's foot from the Community Medical Center were finally confirmed as showing tuberculosis infection in the right foot-ankle. His wounds and foot are now healed and he is presently on anti-tuberculosis medication by Dr.Sander Levinson. It is my firm opinion that the problems with Mr. Patel's foot did arise as a result of the injury he sustained at work on October 12,1975. The literature, the medical picture that does support the fact that the tuberculosis can arise in area of injury to the ankle. We are not implying that the injury itself caused the tuberculosis, but we are stating that the reason the tuberculosis flared up in Mr. Patel's foot was caused by the injury he sustained at work".

On June 6, 1977, Dr. Steindel stated and further certified that :

" Mr. Patel continues to have a pain in his foot and his wound is dry and the X-Rays show what appears to be early fusion betw-een the calcaneous and cuboid bones. It is my opinion that as result of this problem with his foot, Mr. Patel has a permenent partial disability of 15 % regarding his

his right foot. He has continued pain in the foot and he does have a cosmetic problem with his right foot. "

The petitioner was never able to work on job after October 12, 1975. The petitioner was under continuous medical care of Dr. Steindel till March 1978 and under medical care of Dr. Levinson till July 1979 for an anti-tuberculosis medication. In July 1978, the petitioner lost his balance on Stairway of his apartment Bldg. at Jersey City, New Jersey because of his painful right ankle and the petitioner fell down and fractured his left knee. He was taken to Jersey City Medical Center-Hospital, where he had a surgery on July 2, 1978. According to treating physician Dr. Rao, the petitioner has sufferred a multiple fracture of his left tibial plateau. After his discharge from that hospitaliazation, he was followed by his his orthopedist as an out-patient. Dr.Edward Allegara provided medical treatment in 1988.

In a note dated 3-19-1979, Dr. Rao stated

" Because of the fact that the fracture was interarticular and displaced, the petitioner probably developed post-traumatic arthritis of the knee. The pain in the knee is aggravated by weather changes."

Dr. Rao further stated in his medical opinion letter dated 3-16-79 that

" In my estimate, this condition will be permenent. At present, the patient can not ambulate without support of a cane. The extent of disability is 20 %.

From 1-16-1988 to 2-2-1988, the petitioner was under medical care of Dr. Edward Allegara,M.D. Orthopdic Surgeon at Jersey City, New Jersey for abovesaid employment injury. Dr. Allegara found and certified in his medical opinion letter dated 2-2-1988 that:

" I have examined this patient on 1-16-88 and 1-30-88 and reexamined him on todays' date and have found an increase of the partial permenent disability of the right ankle and leg of 35 % and 40 % of the left knee and leg with a cumulative partial permenent disability of 75 % of the total. The primary cause of these disabilities is the injury sustained on 10-12-1975.

On 7-18-1991, Dr. James D.Nelson,M.D. also examined the petitioner and he found an

increase of partial permenent disability of the right ankle and leg to 45 % and the permenent partial disability of the left knee and leg to 50 % with a cumulative permenent disability at 95 % of total. The primary cause of all of these disabilities is the injury sustained on 10-12-1975. It is possible that the condition of the right ankle deformity and left knee deformity together with symptoms of pain will be increasingly worse with time. This injury of the right foot ankle is permenent in nature and will become increasingly worse with the passage of time as will the injury to the left knee.

On February 12, 1988, Dr.Monica Mehta,M.D. also has examined the petitioner for the abovesaid employment injury of the right ankle and other injury of the left knee,and Dr. Mehta stated in her medical opinion letter dated February 12, 1988, that :

" It is also my opinion with a reasonable medical certainity that the trauma sustained to the right ankle while at work initiated a focus for tuberculosis infection in the right ankle to develop resulting in the development of tuberculosis arthritis of the right ankle. It would appear from the history described above that Mr. Patel is a victim of traumatic tuberculosis of the right ankle which was a proximate result of the trauma that he sustained while at work. The standard of care was deviated by the Company's Nurse and by the Company's doctor Dr. Milgram as well as Mr. David Reynolds, the company's personnel Director. The Company doctor Dr. Milgram examined the patient sixteen days after this original injury and despite his complaint of pain, advised him to return to his work. It can be stated with a reasonable medical certainity that this delay in effectuating and expeditious and prompt medical care within an acceptable span of time in this particular case, added very significantly to the development of the tuberculosis infection in the traumatized right ankle. " In Conclusion, we have a patient who is now on 75 % permenent disability due to the trauma sustained while at work and it's resultant effects. The standard of care in this case, was severely breached by his employment medical clinic nurse, Dr. Milgram and the personnel director ,Mr. Reynolds. "

On November 4, 1991, Dr. James D. Nelson M.D. stated in his medical opinion letter on Page 3, Paragraph 7 , that :

" The petitioner states that in 1977, he started a Workmen's Compensation case against his former employer,Sauquoit Fibers Company. This case was lost in 1980 due to mainly to the fact that Dr. Steindel testified that the petitioner's tuberculosis was not job-related inspite of the fact that in his letter to Mr. David Reynolds dated 9-2-76, Dr. Steindel had written,

" It is my firm opinion that the problems with Mr. Patel's foot did arise as a result of the injury he sustained at work on 12-10-1975. The literature, the medical picture does support the fact that tuberculosis can arise in the areas of injury to the body. We are not implying that the injury itself caused tuberculosis but we are stating that the reason that the tuberculosis flared up in Mr. Patel's foot was caused by the injury he sustained at work."

In March 1990, the petitioner has commenced medical malpractice case against all the Company's-employer's doctors and Sauquoit Fibers Company. This litigation is still pending in U.S.District Court,Scranton.Pa. In consideration of all abovesaid medical opinions and letters of the doctors Edward Allegara, Dr.Rao, Dr. Mehta, Dr. Nelson and Dr. David Grow and all other pertaining all the documents in the evidence, Dr.Steindel

and Dr. Sander Levinson knowingly gave a false testimony in the court of Common Pleas before the jury, to cover up and conceal their own Negligence and Medical Malpractice and also to protect their common friend Dr. Milgram, who is the defendent-respondent in this case. Dr.Steindel and Dr. Levinson lied before the jury and committed perjury to defeat petitioner's claims for damages against this respondent Dr. Milgram and have fraudulently concealed their medical records and negligence till March 15, 1988. Therefore the testimony of Dr.Steindel and Levinson must have been striken out as it is conflicting testimony by the petitioner's treating physicians and against the petitioner in violation of Medical Professional Ethics of doctors.

On October 12,1975, the petitioner fell and injured an ankle while at he was working at Sauquoit Fibers Company at Scranton,Pa.

The petitioner's ankle was examined, apparently on two occassions on October 12 1975 and November 7,1975 by the respondent Dr. Milgram. The respondent advised the petitioner following examination of the Right Ankle and X-rays, that he had suffered a sprain, and asked him to go to work. The respondent negligently treated and dianosed petitioner's condition.Later on it was found during the medical treatment by Dr. Eisner and Dr. Steindel that the petitioner had a tuberculosis infection in his right ankle due to mainly gross delay in providing a proper and prompt and an adequate medical treatment of employment injury and delay in providing anti-tuberculosis medication. The respondent and his attorney Paul Barrett,Esq. made a conspiracy with Dr.Steindel and Dr.Levinson in a private conference prior to the trial date and the defendent's attorney Paul Barrett

preapared Dr. Steindel and Dr.Levinson to testify against this petitioner and in favor of the respondent Dr. Milgram at jury trial, in violation of their Medical Professional Ethics, and these two doctors gave absolutely false testimony before Jury,with a malafide intention to defeat the claims of the petitioner. The Jury trial before the Court of Common Pleas of Lackawana County begun on March 8, 1988 and it was completed on March 16, 1988. During the trial, one of the juror was found very sick and was disabled to work and therefore the said juror was relieved from the jury service. The trial Judge failed to replace this juror in this panel as the trial judge erred in not having an alternate juror in this panel. To cover up this gross error of the trial judge, the trial judge insisted to go forward for a trial with eleven jurors in jury panel. The trial Judge persuaded

the petitioner's attorney to agree his own suggestions. The trial judge and petitioners' attorney misguided the petitioner and failed to grant a MISTRIAL. The petitioner did not consent or agree to go for a trial with eleven jurors. The petitioner was compelled and forced by undue pressure of the trial judge and petitioner's attorney to go for trial involuntarily.

INCOMPETENT ATTORNEY :

The petitioner was not represented by a competent, able, and effective Counsel, as he failed to object to incapacitated juror's being excused during the course of trial, but he stipulated on the record to that the juror's being excused. The petitioner's attorney agreed to proceed with eleven jurors. The trial judge failed to obtain a free and independent consent and approval of the petitioner for stipulation that the juror in question could be excused and trial proceed with the eleven remaining jurors.

The petitioner also found that the jury was biased against the petitioner due to his Foreign Nationality, color, creed and Race. The jury was not enthuastic in trial and the jury panel frustrated or confused by the court's awful and abnormal Schedule of time and unacceptable facilities of the lack of court room for this trial judge. The jurors were coerced and infulenced by all abovesaid reasons to reach a verdict in favor of the respondent and against the petitioner, to get rid of this case and get themsleves relieved from the jury panel.The Jury panel took only less than one hour for deliberation. The jury panel failed to read understand and consider all documents and evidence in deliberation. The Jury Panel reached to verdict without appropriate and adequate deliberation of testimony of all witnesses and evidence of this case. The Jury verdict slip was also erased by Jury

panel by changing the number of jurors consenting to answer the question no. 1 and question no. 2. The trial judge failed to declare it a Mistrial and also failed to grant a New Trial to the petitioner. The Jury failed to render a fair and impartial jury verdict in this case as there was no substantial evidence to support jury verdict in this case. The conflicting testimony of Dr. Steindel and Dr. Levinson was not credible at allas it was a product of a criminal conspiracy of the respondent and his attorney with Dr. Steindel and Dr.Levinson against their professional ethics. The trial judge erred in allowing said false and conflicting testimony in evidence before the jury panel. The petitioner's attorney also failed to file a motion to strike out testimony of Dr.Steindel and Dr. Levinson although it was conflicting testimony and it was a result of criminal

conspiracy of the respondent and his attorney with these two witnesses who were a treating physicians of the petitioner. The petitioner's attorney also failed to file a motion to disqualify respondent's attorney from the representing the respondent, although it was admitted by the said two witnesses, that the respondent and respondent's attorney had held a private conference orior to the date of trial for conspiracy to prepare these two witnesses to give absolutely false testimony against the petitioner to favor the respondent. It was also admitted by these two witnesses that the respondent is very closed friend of Dr. Steindel and Dr.Levinson, and the respondent's father was a professor of Dr. Steindel, when Dr. Steindel was a medical college student in Philadelphia.Pa. Dr.Steiindel was under undue influence of the respondent Dr.Milgram and very closed friendship.

Dr. Steindel was unduly influenced by the respondent and respondent's attorney to testify against the petitioner and in favor of the respondent in complete violation of medical professional ethics. The attorney of the petitioner failed to protect the Constitutional legal rights of the petitioner.

MEDICAL RECORDS :

The trial court also erred in permitting medical records of Dr. Steindel and Dr.Levinson in evidence although those medical records were not provided to the petitioner prior to this trial and such medical record were false and of self service, illegal and basesless. The petitioner's attorney failed to raise an objections to the production and introduction of these medical records in evidence. This facts proved that the the petitioner's attorney was incompetent,

and ineffective to represent petitioner in this case. Because of nonavailibility of abovesaid medical records of these two doctors and other documents of their files the petitioner was deprived off his legal right of discovery and inspection. The petitioner was greatly prejudiced in his preparation and prosecution of his claims.

ERROR OF JURY CHARGE :

The trial judge erred in charging jury and rejecting points of charge requested by the petitioner's attorney and in failing to ask aquestion regarding a Contributory Negligence of the respondent in causing a injury and damages to the petitioner. The trial judge also erred in making a jury wholly improper, unclear, confusing and misleading the jury as it had a tendency to mislead and to confuse the jury rather than to clarify the issues of facts and law to

to the jury. The instruction to Jury was harmful to the petitioner, because the trial judge failed to explain the jury issue of Contributory negligence and it's liability for damages of the respondent.

TAMPERED JURY VERDICT :

The trial judge erred in accepting a Jury Verdict as the jury verdict was not supported by substantial evidence and the jury failed to considered petitioner's evidence in it's deliberation of verdict. The Jury Verdict Slip was erased in it's column of Number of juror consenting or answering the questions of Jury Verdict slip. This facts established that jury verdict was not unanimous and some one of jury panel dominated some of the jurors and forced the jurors to change their vote by undue force, coercion and influence against their will. The jury verdict was not of a free will of all jurors. It is illegal.

The trial judge failed to perform his legal duty and obligations to give proper charge to jury and the trial judge failed ask a question in jury verdict regarding the percentage of Comparative Contributory Negligence of the respondent and/or any other party concerned in this case. The Jury Verdict was illegal, improper and unacceptable as the verdict slip was erazed and corrected after final deliberation and determination of jury verdict. It indicated that some of jurors were not agreeable and some jurors have dominated dictated them to arrive to an unanimous jury verdict. The jury verdict was actually not unanimous and voluntary. But the jury verdict was coerced, unduly influenced, involuntary and not supported by substantial evidence and testimony.

JUDICIAL ERROR OF COURT:

When the jury found the respondent negligent and the jury has found that the respondent has caused an injury and damage and harm to the petitioner by respondent's gross negligence, the jury must found the respondent liable to pay all damages caused to the petitioner. The respondent is exclusivelt liable and responsible to pay all these damages and no one else in this case. The respondent was not only substantial factor but was a sole factor in bringing about the petitioner's harm and damages. All these issues were properly raised before the trial judge at jury trial and also in motion for new trial by the petitioner.But the trial judge has failed to consider it. The petitioner's attornney has not waived it at trial. But if he has waived it, then it demonstrates very clearly that he was incompetent and ineffective in services.

MISCARRAIGE OF JUSTICE:

It is legal duty and obligation of the trial judge to provide equal protection of law and equal justice to the petitioner and to grant him a fair and impartial and just trial. The trial court has failed to do so, and the petitioner was not awarded any money for all the dsmages caused by the respondent's gross negligence in this case. It is a gross injustice and miscarraige of justice for the petitioner.

MOTION FOR NEW TRIAL:

On March 16,1988, a jury verdict was declared in favor of the defendent Dr.Milgram and the judgement was entered on March 17,1988. The petitioner filed a Post-Trial Motion for a New Trial. June June 15,1989, petitioner's motion for new trial was also dismissed by the trial judge. The trial judge failed to correct all errors at the

time it was made and the trial judge has failed to reconsider and decide at the post trial stage. The petitioner filed an appeal to the Superior Court of Pa., and on November 29, 1990, the Superior Court affirmed an order and judgement of the Court of Common Pleas-trial court. The petitioner filed a Notice of Appeal to the Supreme Court of Pennsylvania for Eastern District, at Philadelphia,Pa. The petitioner was asked to file a petition for allowance of appeal by Supreme Court. The petitioner_filed a petition for allowance of appeal in time on December 27,90.

MOTION TO APPOINT COUNSEL:

During the pendency of this petition, the petitioner could not avail an attorney to represent him in this appeal, inspite of all the efforts. Therefore,on May 7,91 the petitioner filed a motion to appoint

Counsel or request a services of volunteer Counsel for the petitioner. The motion 'to appoint Counsel for the petitioner was denied by the Supreme Court of Pa. The Supreme Court of Pa. also failed to grant a request for oral arguement and hearing before the court.

MOTION TO DISQUALIFY RESPONDENT'S ATTY.:

As the respondent's attorney Paul Barrett has committed a Criminal Conspiracy,fraud and concealment of medical records of Dr. Milgram, Dr. Steindel and Dr. Levinson till March 15,1988, and has also turned Dr. Steindel, and Dr. Levinson hostile to the petitioner although the said two doctors were treating physicians of the petitioner and made them to give false testimony in the court to support respondent in complete violation of their professional ethics and committing breach of trust.

In consideration of professional misconduct of respondent's attorney Paul Barrett,Esq. the petitioner filed a motion in Supreme Court of Pa. to disqualify respondent's attorney from this legal procceedings. The petitioner submitted a copy of the transcript of testimony of Dr.Steindel and Dr.Levinson who have admitted in their testimony before the jury in Court of Common Pleas regarding the private conference held by the respondent, respondent's attorney, and these two doctors prior to date of a trial, and were prepared to give a false testimony to support the defendent Dr. Milgram and against the plaintiff in Court. The Supreme Court denied petitioner's motion to disqualfy respondent's attorney. The Supre Court of Pa. failed to grant a request for oral arguement before the court and it failed to read and understand the issue of gross misconduct of attorney.

JUDGEMENT AND ORDERS:

On June 14, 1991, the Supreme Court of Pa. entered an orders as follows :

On your petition for allowance of appeal; Petition " June 10,1991" Petition denied- Per Curim.

On your Petition- Motion to disqualify defendent's attorney; June 10,1991" Petition denied- Per curiam .

On your petition -Motion to appoint Counsel "June 10,1991" Petition denied. Per Curiam.

The petitioner filed a petition for reconsideration and rearguement in the Supreme Court of Pa. on June 26, 1991 and it was also denied on July 30, 1991 and a final order denying a Notice of Appeal was then entered on August 22, 1991 in this appeal in Supreme Court of Pa. in this case. This Writ of Certiorari-petition is timely filed on this date.(Appendix- Page

ARGUMENT: Reasons for Granting The Writ :

The subject of what does and what does not constitute the grounds of Mistrial and New Trial has been the subject of much litigation in the trial court. In it's reasons for a judgement and order, the trial court in this matter stated :

" We have deermined for reasons which follows that the plaintiff's motion for a new trial is dismissed.

1. Defendent in his brief provides a "Counter Statement of Questions Involved" as follows:

1. Have the issues which the plaintiff seeks to raise been preserved for review and if so, have any of them any merit?
2. Did not the learned trial judge erred in ruling, as a matter of law, that the Statute of limitations was not a bar to plaintiff's recovery ?
3. Did not the learned trial judge err in denying defendent's motion in Limine and by allowing Dr. Mehta to testify as plaintiff's expert witness although her report was not furnished to the defense until after the commencement of trial ?.

In this context, consideration of defendent's 's cross-motion for post trial relief is moot.

Plaintiff in support of his motion states the questions involved in this pro se brief as follows:

Question No. 1. :

Whether an inability of a juror to continue in a case is permissible ground for a Mistrial ?

Whether the replacement of said juror was absolutely necessary to complete the full panel of twelve jurors for jury panel ?.

Question No.2:

Whether the trial court erred in refusing to grant mistrial and has abused it's discretion in conducting this jury trial with eleven jurors. ?

Question No. 3:

Whether the court has failed to provide an impartial, independent and eligible jurors in the jury panel to try this case in jury trial?

Question No.4 :

Whether the jury panel was tired, frustrated, confused, unhappy and careless in listening this case as this court and it's court administrator have failed to provide a specifice and fixed Court room facility for a trial on the fixed schedule of time on all dates for a hearing or trial.?

Question No.5:

Whether the jury panel and it's jurors were influenced, coerced, threatened and persuaded to agree jury verdict in favor of the defendent Dr. Milgram, as Dr.Steindel

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Whether trial judge has erred in preparing and amending and submitting the points of charge of the plaintiff and the defendent so many points of charge were deleted, rejected, amended,erased and/or dropped without any explaination and consent and knowledge of the plaintiff?

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Whether the Verdict Slip dated March 16,1988 is illegal, improper, invalid and unacceptable in law as the said Verdict Slip states and established in a primafacie evidence that one or more jurors out of eleven jurors were not agreeing the said answer to question no. 1 and 2 and the fore person Michael Hanly or some one else has changed the verdict slip or tampered with ti's contents in illegal,improper and unauthorized manner against the principles of natural justice. ?

And, in a supplemental pro se brief the plaintiff sets forth the following additional questions :

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Whether the defendent's cross motion for a post-trial relief is tenable at law in consideration of the facts of this case for administration of justice?

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Whether the defendent has failed to furnish the copy of their medical records prior to the prescribed time of the trial of this action to the plaintiff and later on submitted and produced certain medical records of Dr. Steindel and Dr. Levinson in evidence as witnesses of the defendent Dr. Milgram, in complete violation of the Rules and Law of this trial court ?

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The trial judge further states in his judgement " Plaintiff in his "Notice of motion for new trial" raised only(1) issue, namely, Whether the court erred in failing to declare a mistrial when one of the jurors became incapacitated.Defendant contends that we should not even consider this issue let alone any other issues contained in the plaintiff's briefs since the motion was not timely filed."

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" If no objection is made, error which could have been corrected in pre-trial proceedings or during trial by timely objection may not constitute a ground for post-trial relief. "

The trial judge has failed to consider that the plaintiff's attorney have raised certain objections at the trial and the trial judge has overruled all of them, and therefore those issues were raised at the trial and those issues can be raised in this motion for post-trial reliefs. The trial judge has erred in denying to review and reconsider all those issues raised by the plaintiff in post-trial motion.

Nevertheless, plaintiff compliains in his " Notice of Motion for New. Trial" that :

"' .... the trial of this case was illegal, invalid, improper and defective in facts and law. Actually it was a. mistrial in the law and it should have been setaside by this court on moment(Sic) one of the jury member was declared sick was relieved(sic) from the jury panel of this case. There are so many other grounds for mistrial in this case. I want this court to declare (sic) this trial as mistrial and schedule (sic) this case for a new trial on merits of the case to perform (sic) the perfect justice and fair justice."

The trial judge has failed to consider all these issues of facts and issues oflaw although they were raised timely at the trial by the plaintiff's attorney, and were overuled by the court. The issue of excusing one of juror who was sick and incapacitated and was required by the court to be relieved from the jury duty, and court's failure to replace the said juror to complete jury panel of 12 jurors, and a Court's error or failure to select three alternate jurors for the jury panel was a very serious error

and negligence of the trial judge in this case. The trial judge wanted to cover up his own errors and mistakes of the trial before the jury panel of this case.

MISCONDUCT OF TRIAL JUDGE:

The trial judge therefore, in the above said reasons, insisted and persuaded the attorneys of the plaintiff and defendant to go for a trial with eleven jurors in his Chamber in the absence of the plaintiff and defendant. The trial judge wanted to finish this trial as he was coming to Scranton,Pa. from Reading,Pa. as he was a retired judge and this case was assigned to him for a jury trial. This trial judge failed to ask the defendent to furnish all medical records of the defendent and his medical witnesses to the plaintiff at pretrial conference and the trial judge insisted to proceed to go for trial and to select the jury panel.

The trial judge also failed to select 3 alternate jurors for the jury panel and he committed a very serious judicial error and the trial judge has violated constitutional legal rights of the plaintiff, in depriving of the plaintiff, to have jury trial by twelve jurors as provided in Constitution of Commonwealth of Pennsylvania and also Constitution of United States of Americas. The trial judge was not much interested to render a fair and impartial trial and fair justice to the plaintiff, but the trial judge was only interested to finish this case and wanted to get rid of it, so that he may not have to commute from Reading to Scranton. The trial judge never thought of discomfort of jury panel, and lack of facility of courtroom for a fair trial, conflicting medical testimony of Dr.Steindel and Dr.Levinson, introduction of all medical records of the defendent Dr.Milgram, Dr.

Steindel and Dr. Levinson in evidence although the copies of the said medical records were not furnished to the plaintiff prior to trial. The trial judge neglected his all the judicial duty and obligations to render a fair and just trial.

To cover up all abovesaid judicial errors and mistakes, the trial judge decided to make a stipulation on record in the absence of plaintiff in his chamber and convinced plaintiff's attorney to agree upon the said stipulation. The plaintiff was also not taken into confidence by the plaintiff's attorney prior to he agrred upon to accept stipulation. The plaintiff's attorney should not have agreed upon said stipulation as it was against the plaintiff's interest and the plaintiff's Constitutional legal rights were violated by the trial judge and trial judge was absolutely wrong in imposing his own wishes upon the plaintiff and the

plaintiff's attorney in violation of principles of natural justice. The plaintiff's attorney was not competent, not effective, and not able to render adequate legal services to the plaintiff. The plaintiff's 's attorney has failed or neglected to protect the Constitutional legal rights of the plaintiff in this trial, as the trial judge was prejudiced against plaintiff and plaintiff's attorney during the trial. The trial judge can not and should not find an excuses in the name of plaintiff's attorney and the trial judge can not legalize his own judicial errors, mistakes and also misconduct. The trial judge has abused his judicial authority, judicial discretion and judicial powers. The trial judge was required to act deligently, impartially, and sympathatically to render fair trial fair justice. This is a gross misconduct of trial judge.

The petitioner was interviewed by the trial judge independently prior to making his decision to go for a trial with 11 (Eleven) jurors of jury panel. The trial judge also failed to provide sufficient instructions and information to plaintiff regarding his legal Constitutional rights to declare it as mistrial because of lack of Jury Panel of Tweleve Jurors, and have a new Trial because of failure of trial judge to provide an alternate juror to complete a jury panel of twelve jurors. The trial judge has committed a gross judicial error and misconduct, and he should have declare a mistrial and should have granted New Trial immediately. Or the trial judge should have granted plaintiff post-trial motion for a New Trial immediately.

MISLEADING JURY CHARGE:

The trial judge has committed gross judicial error in charging jury. The trial judge has failed to instruct the jury panel in explaining the manner and the method in which the jurors are required to evaluate the conflicting testimony of medical doctors Dr. Steindel and Dr.Levinson and the evidence presented to jury at the trial. The jury charge was not proper, adequate and sufficient to clarify the evaluation of evidence by jury. The erroneous and improper instructions and charge of jury have caused a serious misleading and misunderstanding of evaluation of an evidence by the jury. The jury panel has therefore failed to arrive to unanimous jury verdict and the jury has also failed to deliberate conscitiously and failed to deliberate in fair consideration of evidence.

JURY VERDICT IS NOT SUPPORTED BY EVIDENCE

The jury verdict is not supported by substantial evidence in this case. Therefore, the jury verdict is pervert and wrong or baseless and the trial judge should have rejected it immediately and trial judge should have granted New Trial immediately in the interest of justice. The plaintiff has proved beyond reasonable doubt that the respndent Dr. Milgram was negligent and the jury also found that Dr. Milgram was negligent in proving medical treatment to the plaintiff and the tuberculosis was flared up in plaintiff's right ankle because of negligence of Dr. Milgram. When the jury has found this respondent negligent, the respondent's said negligence was a sole factor in bringing about the plaintiff's harm. There was no other reason and factor to bring this harm to the petitioner at all.

The conclusion of jury verdict is baseless and not supported by evidence of this case. The jury panel has misunderstood the issue of facts to be determined by jury panel. There was no other reasons or the factors to cause any harm to the petitioner. Therefore, the jury verdict was required to be setaside immediately. The trial judge has overuled all the objections and motions of plaintiff's attorney arbitrarily without any good leagl reasons. The Superior Court of Pennsylvania and the Supreme Court of Pennsylvania have also failed to read, review and consider all the documents in evidence and testimony of witnesses in this case. The petitioner's motion to appoint a Counsel was denied by these Courts and the petitioner is deprived off his legal rights to have Equal Protection Before the Law and to have a Competent Counsel to represent in the court in case.

DISCRIMINATION AGAINST PETITIONER:

The petitioner is discriminated by the trial judge, Jury Panel and also by the attorneys of Commonwealth of Pennsylvania because of petitioner's Nationality Origin, Race, Color and Creed. The petitioner could not avail an attorney to represent him in the courts to get a fair justice. The petitioner is a victim of discrimination and fraud in this case. The petitioner has requested attorneys of Philadelphia Bar and Lackwana County Bar to refer to competent and effective attorney to handle my case. But None has agreed to do so. The petitioner, thereafter, filed motion to appoint counsel in the courts and the Superior Court and Supreme Court of Pennsylvania denied it. Where Can I Go TO GET Fair Justice ? I have no alternative, but to tell my tragic story to the Supreme Court of USA to render fair, impartial justice.

The existing law dealing with a Court's error was exemlified in Thomson Vs,City of New York et al. Ad 2d,N.Y.L.J.8-10-90 P.27, (1st Dept.) in which it states that:

> " We recognize that no party to any litigation has vested right to have court perpetuate it's own error."

Therefore, in consideration of the present law and facts of this case at the bar,leave to appeal should have been granted by the Supreme Court of Pennsylvania sothat the Hon. Court may have an oppertunity to examine and consider all records adequately and to serve the interest of justice and to protect the constitutional legal rights of the petitioner. Upon the review of the Collouguy which transpired between the trial judge and the attorneys of petitioner and respondent in chamber of trial judge, for excusing a sick juror, it is very clear that the petitioner was not present in the chamber at that time. When the petitioner was later on

called in the chamber of trial judge,the trial judge failed to explain anything to the petitioner, but the petitioner's attorney asked a leading question and suggested an "YES" answer, without any explaination. The trial judge and petitioner's attorney have violated Constitutional legal rights of petitioner by allowing the jury trial by eleven jurors The trial judge has also violated legal rights of petitioner to have Equal Protestion of law before the court, Equal and Fair Justice before the court of law. The Civil Rights of the petitioner is violated by the trial judge. The petitioner's attorney also failed to protect petitioner as said attorney failed and/or neglected to represent the petitioner in competent able and effective manner as an attorney and Counsel in the Court of Law. The Hon. Supreme Court of Pa. should have allowed the petition for allowance of appeal.

$ 1073. Grounds of Mistrial, Withdrawal of Juror or discharge of jury:

Juror's Voir Dire denial for disclosure of acquaitance or relationship with attorney in case or the defendent and defendent's own witnesses are grounds for new trial or mistrial. 64 ALR3d 126

The plaintiff states that some of the jurors may be patient, friend and acquaitance of defendent Dr.Milgram and his own witnesses Dr. Steindel and Dr. Levinson.

In determing whether substantial justice warrants the calling of a mistrial, the trial court has a wide power and discretion. Evers Vs. State (Fla. App. 280,so 2d 30).

$ 1074 : Juror's illness or other Disability:

"Inability of Juror to continue in a case is a permissible ground for a mistrial."

In this case, of removal of sick juror and nonreplacement of juror came within General exception created by Statute allowing discharge and replacement of juror with alternate where juror dies, become ill, or any other reason is unable to perform his duty.

Mark Vs. Colgate University, 53 AD2d 884, 385 NYS2d 621.

Decision to declare mistrial is within sound discretion of trial judge and will not prohibit retrial, if trial judge carefully considered all the alternatives and did not act in abrupt, erratic and caprecipitate manner. "

$ 1075 : Jury's Misconduct: (Attorney)

" Trial Court's refusal to grant mistrial was an abuse of dicretion where the plaintiff's Counsel was seen in contact with juror outside courtroom holding a conversation which was not overheard, and no explaination of contact was offered in the court."

Printed Terry Finishing Co. Vs. Lebanon. (1977 Pa. Super.) 332 A2d 460

The respondent and respondent's attorney have contacted and have held a private conference with Dr. Steindel and Dr.Levinson in their medical office and have conspired to testify against petitioner and in favor of respondent and this facts of conference was admitted by Dr.Steindel and Dr.Levinson who are respondent's witnesses but petitioners' treating physicians, in their cross examination in their testimony before jury. It was gross misconduct of Attorney of Defnt.

The respondent and respondent's attorney Paul Barrett, might have also contacted some of the jurors too out of Courtroom to favor the respondent as a Doctor. The misconduct of the respondent and his attorney Paul Barret, during the trial inside and outside the courtroom, resulting in substantial and irreparable prejudice to the petitioner's case, requires that trial judge must declare a mistrial at any time during the trial suo moto, or upon the motion of petitioner in this case. In this case the respondent and his attorney have acted in conspiracy and have committed very serious misconduct to warrant a mistrial of case.

$ 1095 : Statutory Provisions :

" If at any time during criminal trial a juror looses the ability to perform his duty and to render a fair and unbiased verdict, the trial court, can under the Provisions of Penn. C. $$ 1123 and 1089 in exercise of it's own function and discretion and on showing of a good cause, order such juror discharged. The juror's inability to perform his function must

appear as a demonstratable reality. But if there is substantial evidence supporting the decision, it will be upheld in on Appeal, The trial court's conclusion that in light of her physical emotional reaction to the evidence, a juror would be unable to perform jury duty and unable to participate in deliberation process, and such inability was demonstrable reality, was supported by the record. People Vs. Van Houten (1980) 113 Cal. App. 3d 280 170 Cal.Rep 189.

In prosecutuion of robbery (Penn Code $ 211) in which a juror advised trial court during deliberation that she felt herself to be unable to perform her duties as a juror, trial court properly exercised it's discretion to discharge the juror and substitute an alternate in her place, Where the juror told the court she felt intimidated by other jurors into abandoning her disagreement with the majority opinion and that she could not comply with instructions to vote her own conclusions and avoid the influence of a majority with which she disagreed. "
People Vs. Warren, (1986 1st Dept.) 176 Cal App. 3d 324, 231,221,Cal.Rptr.768. "

The above case laws has been consistently followed by the various courts of Pennsylvania State and Federal Courts of Appeals.

Based upon the above authority,it should be apparent that trial judge and Lower Courts have failed to exercise their judicial discretion to declare mistrial in this case.

IMPROPER AND RACIAL JURY:

The Supreme Court of United States ruled on January 23,90 in Case of Milkovich V. Lorain Journal, No. 89-645 that:

" The Constitution requires Juries to be drawn from a fair cross section of the community that cross section need not be reflected in the composition of a particular jury. But the black defendent was allowed to challenge the prosecutor's exclusion of blacks from the jury.

The decision, Batson V. Kentucky, was based on the 14th Amendment's prohibition for a racial discrimination. The Sixth Amendment requires that a jury panel should be impartial. The court has ruled that a impartial jury meant at minimum, a jury drawn from a pool from which no segment of the Community was excluded. The question before the court today was whether Sixth Amendment guarantee for a fair cross section applies to the jury itself as well as to the dozens of the members of the pool from which the jurors are selected.

The defendent, Daniel Holland, argued that the removal of the black prospective jurors meant that he was convicted unconstitutionally by a jury that was not a fair cross-section of the community.The prosecution had used preemptory challenges for which no reasons needs to be given, to remove the two black members of the jury panel pool.

Hon. Justice Thurgood Marshall accused that the majority of "Selective Amensia" and insulting" an especially individous from racial discrimination" from scrutiny under the Sixth Amendment. The 14th Amendment also

forbids discrimination in the jury selection. The trial judge is under obligation to see that no prospective juror of jury pool should be removed from a jury selection because such juror is Hispanic,Balck, Asian American or any other race, or a Nationality Origin. :

MISUSE OF JURY SELECTION : DISCRIMATION:

In this case at the bar, the defendent's attorney has used a preemptory chalaenges to remove the hispanice, black and Asian American potential jurors from jury pool. The trial judge has allowed the defendent's attorney to do so and therefore the Constitutional rights of the petitioner are violated. The trial judge has failed to provide a fair, impartial trial with a fair jury. The jury verdict is illegal,improper and not supported by evidence and it should be rejected, and it should be declared mistrial and a new trial should be granted in the interest of justice. The trial judge has failed to exercise his judicial discretion and power/authority to render a fair trial.

CONCLUSION : AND RELIEF:

The trial judge has abused his discretion in failing to select an alternate Jurors for a Jury Panel for a Trial of the case. The trial judge failed to charge jury in in legal and proper manner and failed to explain the jury all questions of jury verdict slip. The trial Judge should have asked Question No.2 to jury as follows:

" Was the defendent's negligence a substantial factor in bringing about the plaintiff's harm and What percentage of comparative Contributory Negligence of the defendant in bringing about plaintiff's harm .?

Question No. 3: State amount of Damages:
Special Damages : Compensative Damages
Punitive Damages:

The Jury Panel was actually confused and mislead by the trial judge. The Superior Court and Supreme Court of Pa. have failed review, read and consider a Citation of a Case Laws in petitioner's brief. All those briefs and records should be reviewed by this Hon. Court before final determination of this Writ of Certiorari of petitioner.

The Supreme Court of Pa. has failed to exercise it's power and discretion to allow petition for allowance of appeal without any good legal reasons and deprived off petitioner's constitutional legal rights and Civil rights. The petitioner has got now 95 % permenent disability since 1978 and did not receive any compensation or damages at all. An employer has discriminated and victimized petitioner because of his Nationality Origin and as new Immigrant in U.S.A. The A.C.L.U and Public International Law Center of Phila. refused to handle this case. The Courts denied motion to appoint Counsel. The petitioner has no attorneny and therefore has filed petition pro se.

Accordingly, petitioner respectfully urge and submits that this Petition for Writ of Certiorari should be granted and judgement of the Courts below should be reversed, and this case should be remanded tc Superior Court of Pa. or

Alternatively, the petitioner would urge that pursuant to Rule 16.1 of the Rules of this Hon. Court, the Writ requested herein be granted and Summary disposition be made either on merits, or by remanding to the Superior Court of Pennsylvania, Eastern District, Philadelphia. or to the Court of Common Pleas, of Lackawana County, Scranton, Pa. for a new trial and for further consideration on merits of this case, to serve the interest of justice.

Respectfully Submitted

Manoj Kumar Patel,
Petitioner, Pro se.
3152, Kennedy Blvd.
Jersey City,N.J.07306
Tel.201-659-2409
Petitioner, Pro se.

APPENDIX

Proth. Form 1023 -10M 19

No. 321 May Term 1979

LACKAWANA COUNTY. SS:
In Common Pleas

MANOJ KUMAR PATEL

Vs.

DR. ROBERT MILGRAM, ET AL

To Clerk, Judocial Records-

ENTER JUDGEMENT FOR DEFENDENT IN ABOVE CAPTIONED MATTER PURSUANT TO Jury Verdict dated 3-17-88.

Paul A. Barett,
Attorney for Defendent.

Ray A, Alberigi,
Prothonotary
July 14, 9.31A.M.'89

FILED FOR RECORD; Ent. 83

MANOJ KUMAR D.PATEL,		
MANOJKUMAR D.PATEL,	x	IN THE COURT OF
Plaintiff,	x	COMMON PLEAS OF BERKS COUNTY, PENNSY_
Vs.		LVANIA
ROBERT MILGRAM,	x	CIVIL ACTION_LAW
DEFENDENT,	x	No. 321 May Term 1979
	x	

ORDER

AND NOW, June 15, 1989, upon consideration of the motion for new trial of plaintiff Manojkumar D.Patel, it is ORDERED that the said motion for new trial be and hereby is dismissed. And, it is further ORDERED that the cross motion for post-trial relief of defendent Robert Milgram,M.D., be and hereby is dismissed.

By The Court,

F. Edenhart. S.J.

MANOJKUMAR D.PATEL,	X	IN THE COURT OF
PLAINTIFF,	X	COMMON PLEAS OF LACKAWANA COUNTY
VS.	X	CIVIL ACITION-LAW
ROBERT MILGRAM,M.D.	X	No.321 May Term1979
DEFENDENT,	X	

OPINION, June 15, 1989, Edenharter,S.J.

Plaintiff, Manojkumar D.Patel instituted this medical malpractice action against defendent Robert Milgram,M.D.,to recover damages arising from defendent's treatment of an injury to plaintiff's right ankle. A jury trial, at which time the plaintiff was represented by private counsel, resulted in a verdict in favor of defendent.

Plaintiff filed a pro se motion for a new trial. In addition, defendant filed a cross motion for post trial relief.[1]

We have determined for reasons which follow that plaintiff's motion for a new

1. Defendent in his brief provides a "Counter Statement of Questions Involved" as follows:

1. Have the issues which the plaintiff seeks to raise been preserved for review and if so, have any of them any merit?

2. Did not the learned trial judge erred in ruling, as a matter of law, that the Statute of limitations was not a bar to plaintiff's recovery ?

3. Did not the learned trial judge err in denying defendent's motion in Limine and by allowing Dr. Mehta to testify as plaintiff's expert witness although her report was not furnished to the defense until after the commencement of trial ?.

In this context, consideration of defendent's 's cross-motion for post trial relief is moot.

Plaintiff in support of his motion states the questions involved in this pro se brief as follows:

Question No. 1. :

Whether an inability of a juror to continue in a case is permissible ground for a Mistrial ?

Whether the replacement of said juror was absolutely necessary to complete the full panel of twelve jurors for jury panel ?.

Question No.2:

Whether the trial court erred in refusing to grant mistrial and has abused it's discretion in conducting this jury trial with eleven jurors. ?

Question No. 3:

Whether the court has failed to provide an impartial, independent and eligible jurors in the jury panel to try this case in jury trial?

Question No.4 :

Whether the jury panel was tired, frustrated, confused, unhappy and careless in listening this case as this court and it's court administrator have failed to provide a specifice and fixed Court room facility for a trial on the fixed schedule of time on all dates for a hearing or trial.?

Question No.5:

Whether the jury panel and it's jurors were influenced, coerced, threatened and persuaded to agree jury verdict in favor of the defendent Dr. Milgram, as Dr.Steindel

and Dr. Levinson testified in favor of the defendent Dr.Milgram as a Hostile witnesses pursuant to their conspiracy.

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Whether the testimony of Dr.Steindel and Dr. Levinson were in Conflict of Interest with the plaintiff's testimony and the plaintiff's claims and therefore said testimony of Dr. Steindel and Dr. Levinson should have been discarded from the evidence and the jury should have been asked to ignore these testimony from evidence ?

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And, in a supplemental pro se brief the plaintiff sets forth the following additional questions :

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Whether the plaintiff was done injustice by the defendent, defendent's attorney in misguiding this trial court in 1978 and 1979 when this plaintiff filed an initial civil action in this court and this court has a competent exclusive jurisdiction on the defendent and subject matter of this civil action ?.

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The trial judge further states in his judgement " Plaintiff in his "Notice of motion for new trial" raised only(1) issue, namely, Whether the court erred in failing to declare a mistrial when one of the jurors became incapacitated.Defendant contends that we should not even consider this issue let alone any other issues contained in the plaintiff's briefs since the motion was not timely filed."

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" If no objection is made, error which could have been corrected in pre-trial proceedings or during trial by timely objection may not constitute a ground for post-trial relief. "

The trial judge has failed to consider that the plaintiff's attorney have raised certain objections at the trial and the trial judge has overruled all of them, and therefore those issues were raised at the trial and those issues can be raised in this motion for post-trial reliefs. The trial judge has erred in denying to review and reconsider all those issues raised by the plaintiff in post-trial motion.

Issues not raised either at trial or by motion for post-trial relief can not be raised, for the first time, in a subsequent brief in support of a post-trial relief motion. Presidnt Judge Cirillo in Disale V. P.G. Pub. Co. ----Pa. Superior Ct.--544 A.2d 1345 (1988) stated :

> Post-trial practice is governed by Pa.R.C.P. 227.1, Which requires timely objection and specific mention in a post-trial motion before an issue may be considered by the post-trial court... The purpose for this rule is to afford the trial court the oppertunity to correct an error at the time it is made, and to inform the court of the issues which must be decided at the post-trial stage...m thereby giving it the first oppertunity to review and reconsider the determination it made at trial" (Citing authority)."

Under the circumstances, however, for reasons of judicial ecomony we have examined and considered the issue contained in the new trial motion, and issues raised in plaintiff's briefs.

Plaintiff was represented by competent, able and effective counsel who not only did not object to an incapacitated juror's being excused during the course of the trial but expressly stipulated on the record to that juror's being excused. His counsel also agreed to proceed with the eleven remaining jurors. In addition,parties themsleves were interviewed by the trial judge and they, independently of their counsel, stipulated that the juror in question could be excused and trial proceed with the eleven remaining jurors. Nevetheless,plaintiff complains in his "Notice of Motion for New Trial " that

> " -.. the trial of this case was illegal, invalid, improper and defective in facts and law. Actually it was a mistrial in the law and it should have been setaside by this court on moment (sic) one of the jury memeber was declared sick and was relieved (sic) from the jury panel of this case. There are so many other grounds for mistrial in this case. I want this Court to declare (sic) this trial

as mistrial and schedule (sic) this case for a new trial on merits of the case to perform (sic) the perfect justice and fair justice.

Here we have no objection to the trial continuing in the absence of the incapacitated juror, no motion for mistrial, but rather a stipulation on the record between counsel, confirmed on the record by the parties themselves, that the juror be excused and the case proceed with eleven (11) jurors. We find no merit to this contention.

Plaintiff's brief sets forth eleven (11) iisues, none save the first two having been raised in the plaintiff's "Notice of of New Trial Motion ". The first two deal with the inability of the juror to continue as constituting a "permissible ground for mistrial ", that juror's replacement being"absolutely necessary" and the court's"refusing to grant mistrial

and (abusing its) discretion in conducting the jury trial with 11 jurors."

These issues have already been discussed and are without foundation. The other issues involave the failure of the court to provide impartial, indepndent, and eligible jurors in the panel, the failure of the court to provide specific and fixed courtroom facility for the trial and a fixed scheduled time of all dates of hearing; whether Dr. Steindel and Levinson 's medical records should have been kept out because of a conflict of interest or because their apperance was brought about as a result of " undue presuure coercion"; Whether the trial judge erred in his charge to the jury and whether the verdict slip bears evidence that it was tampered with. We have examined and considered these issues and find that they are also without merits.

Plaintiff's supplemental brief in questions 1 and 2 deals with defendent's cross motion and as already indicated it is not necessary that these questions be considered. We have examined and considered questions 2 --5 inclusive. The allegations contained therein are without evidential validity and accordingly form no bais fora new trial.

There can be no doubt that this litigation portrays a long and tortured history. However, in the final analysis, plaintiff was wanted and received a fair jury trial. The verdict of the jury was supported by the evidence and applicable law and should stand.

In conclusion, plaintiff's motion for a new trial requires dismissal.

BY THE COURT:

F. edenharter,

---

s .j.

Filed for Record
May 17 9.30 AM "88

MANOJKUMAR D.PATEL, x IN THE COURT OF
PLAINTIFF x COMMON PLEAS OF
VS. LACKAWANA COUNTY
x CIVIL ACTION-LAW
ROBERT MILGRAM.M.D.,
79 May Term 321
DEFENDENT x

VERDICT SLIP

Question 1:

Do you find that the defendent, Robert Milgram, was negligent ?

Yes 10/11 No —

If you answer Question 1 "NO", you should not answer any further questions and should return to the courtroom.

Question 2 :

Was the defendent's negligence a substantial factor in bringing about the plaintiff's harm ?

Yes _____ No 10/11

If you answer question 2 "No", you should answer any further questions and should return to the courtroom.

Question 3:

State the amount of damages, if any, sustained by the plaintiff as a result of the professional performance of defendent.

$ _____

16 a

Date: March 16, 1988

Michael Hanley

FOREPERSON

MOLDED VERDICT

We the jurors find in favor of defendant Robert Milgram, M.D. and against plaintiff Manoj KUmar D.Patel,

March 16, 1988

By the Court

Fred Edenharter.S.J.
Pr4sently presiding.

J.A24020/90-1

MANOJKUMAR D.PATEL,
APPELLANT

VS.

ROBERT MILGRAM,M.D.
APPELLEE

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO.02794 Phila.89

JUDGMENT

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the court of Common Pleas of Lackawana County be, and the same is hereby affirmed.

BY THE COURT:

David A. Engle....
Prothonotary

Dated: November 29, 1990

J. A24020/90-1

MANOJKUMAR D.PATEL,
APPELLENT

VS.

ROBERT MILGRAM,M.D.
APPELLEE

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 02794 Phila.89

Appeal from the order of the Court of of Lackawana County, Civil at No.321 May Term, 1979.

BEFORE: OLSZEWSKI, MONTEMURO AND FORD ELLIOTT, JJ.

FILED NOV. 29,90

MEMORANDUM :

The appellent, Manojkumar D.Patel, appeals pro se from the denial of his petition for post-trial relief following a jury trial. In October of 1975,appellent fell and injured an ankle while he was working at the Sauquoit Fibers Company in Scranton, Pennsylvania. Appellent's ankle was examined , appearently on two occassions in October and in November of 1975,by an

appellee, Dr. Robert Milgram. Dr.Milgram apparently advised the appellent,following an examination of the ankle and x-rays, that he had suffered a sprain. Appellent claims that Dr. Milgram negligently treated and diagnosed his condition. Testimony at the trial revealed that it was subsequently determined that appellant had a tuberculosis in the ankle. N.T. March 15, 1988, at 12.

Our review of this matter is complicated by appellent's failure to comply with the Rules of Appellate Procedure, particularly Pa. R.A.P. 2111. Further, our record contains only portions of the trial transcript. However, following a careful reading of appellent's brief and the record before us, we find that we are able to consider and to dispose of all of the issues raised by appellent. We now affirm the trial court's denial of post-trial relief, as all of the

issues set forth by appellent are meritless. 1

The appellant has set forth eleven issues in his appellate brief. Although these issues are not addressed in order in

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1

Appellee argues that all issues raised herein are waived. The jury returned a verdict in favor of the appellee on March 16,1988. During the trial, the appellant was represented by counsel. On April 4, 1988, the appellant filed a letter in the trial court, advising the court that his Counsel would not participate in an appeal. Further, appellant stated in the letter that he wanted a new trial, because the trial court erred in failing to declare a mistrial when one of juror was relieved from the jury panel due to illness. Subsequently, appellent filed a brief in support of post-trial relief, wherein he raised numberous issues. The brief was filed in December 1988.

2 This Cpurt has recognized that "(t)he rule requiring that post-trial motions be filed within Ten Days after notice of filing is a procedural rule; it is not jurisdictional. A trial Court has broad discretion to entertain untimely procedural motions." Witting v.Carlacci, 370 Pa.Super.584,--, 537 A.2d 29,30(1988)

Citations omitted).

Instantly, the trial court noted that appellant had not complied with the provisions of Pa. R.C.P. 227.1, but nevertheless addressed the issues raised " For reasons of judicial economy." Op. of Trial Court, June 15, 1989, at 6. We find no error in the trial court's exercise of discretion nor does it appear that the appellee will be prejudiced in any manner by the review of the substantive issues raised by the appellant.

---

the argument" section of appellant's brief,[2] we will address the issues seratim.

In his first two issues, appellant essentially claims that the trial court erred in failing to grant a mistrial when one Juror during the course of appellant's trial, became ill and was therefore relieved from jury service. Appellant consented to trial by less than twelve jurors, and therefore his claim is patently meritless. See Blum V. Merrell Dow Pharmaceuticals, 385 Pa. Super.151, 560 A 2d 212(1989)

The trial court addressed appellant's claim concerning the number of jurors as follows:

> Plaintiff was represented by Competent, able and effective counsel who not only did not object to an incapacitated juror's being excused during the course of the trial but expressly stipulated on the record to that juror's being excused . His counsel agreed to proceed with the eleven remaining jurors. In addition, (the) parties themselves were interviewed by the trial judge and they, indepndently of their counsel, stipulated that the juror in question could be excused and trial proceed with the eleven remaining jurors.

Op. of Trial Court, June 15, 1989, at 6.

In the issues three, four and five, the appellant claims that the jury was biased against him due to his nationality, frustrated and confused by the court's schedule and facilities, and coerced to reach a verdict in favor of the defense.

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2 Page 21a.

Appellant erroneously labelled the " Arguement" section of his brief as follows: " Summary of Arguements. " Brief for Appellant at 18-52.

These claims have been raised in a vaccum. We can find no support in the record to support these assertions, or to support a finding that the jury was unable to render a fair verdict in this case. Accordingly, these issues are meritless.

In issues six and seven, appellant claims that the trial court erred in admitting the testimony of Dr. Carl R.Steindel and Dr. Sander J.Levinson, as it was an ethical conflict of interest for these witnesses to testify due to their mutual friendship and professional association with the appellee. These considerations are relevant to credibility and not competency. Appellant's counsel did cross-examine these witnesses concerning their relationship and affiliation with the appellee. See. N.T. , March 15, 1988, at 47-50. There was no error on the part of the trial court in

allowing these witnesses to testify.

As an eighth issue, appellant contends that the trial court erred when the Court permitted the medical records of Dr. Carl Steindel and Dr. Levinson to be introduced because these records " were never provided to the plaintiff before this trial and such medical records may be false and illegal or baseless." Brief for Appellant at 5. This claim must fail, because during the trial, appellant's counsel did not object to the introduction of the records. see N.T., March 15, 1988. at 120. Further it appears from the statements contained in appellant's brief in support of post-trial motions, filed December 12, 1988, that appellant was provided with a copy of these medical records at least by the date of the pretrial conference.Even assuming, arguendo, that the records had not been provided prior to trial, the

appellant has failed to establish that his defense was in any way prejudiced.

Issues nine and ten center upon appellant's claim that the trial court erred in charging the jury. Even though our record does not contain a transcript of the jury charge, appellant has not demonstrated that his claim has anyarguable merit.

Initially, we note that the court is never required to accept, verbatim, the points of charge submitted by the parties. Appellant challenges, in the general fashion the language used by the trial court in explaining the manner in which the jury was to evaluate the evidence presented at trial. A New Trial will be granted only where a jury charge " is wholly inadequate or unclear, or if it has a tendency to mislead and confuse rather than to clarify the issues." Jistarri v. Nappi, 378 Pa.Super. 583,---, 549 A.2d 210,213,(1988).

Appellant has not set forth such a claim in the instant case. Appellant merely stated that the jury charge was not " proper , enough and sufficient." Brief for Appellant at 29,. Moreover, to constitute reversible error, a jury instruction must not only be errorneous, but it must also be harmful to appellant. Appellant has failed to address this requisite for post-trial relief.

Finally, the appellant contends that the verdict slip was illegal, and improper, because it appears that some one erased it or corrected it. This claim is patently meritless. The verdict slip, which was corrected, nevertheless clearly indicates that the jury's verdict was unanimous. Although the jury determined that appellee had been negligent, the jury also determined that appellee's negligence was not a substantial factor in bringing about the

appellant's harm.

Order affirmed. [3]

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[3] We recognize that throughout appellent's brief, he raises several issues which were not raised at any time before the trial court. Consequently, these issues are deemed waived. Appellant claims that the court erred in failing to instruct the jury concerning the failure of the appellee to produce certain evidence and to call a witness. Brief for appellant at 18. Appellant also contends that the language contained in verdict slip was improper. Id. at 29. Finally, the appellant devotes a large portion of his brief to what appears to be a claim that the trial court, baed upon the evidence presented at trial, should have entered a j.n.o.v. Id. at 46-52. None of these issues have been preserved for appeal.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

City Hall
Philadelphia.Pa.19107
(215)560-6370

June 14, 1991

Manojkumar D.Patel
3152, Kennedy Blvd.
Jersey City, N.J.07306

Re: Manojkumar D.Patel, Petitioner V.
Robert Milgram, M.D.
No. 1118 E.D. ALLOCATUR DOCKET 1990

Dear Mr. Patel,

Tgis is to advise you that the following orders have been entered in the above captioned matter.:

On your Petition for allowance of Appeal.
" June 10, 1991.
Petition Denied.
Per Curiam. "

On your "Plaintiff's Motion to Disqualify Defendant's Attorney"
" June 10,1991.
Petition Denied.
Per Curiam."

On your "Motion to Appoint Counsel"..
" June 10, 1991.
Petition Denied.
Per Curiam. "

Very truly yours,

Bernice G. LaBoo
Bernice G. laBoo
Chief Clerk.

/pj

cc; The Honorable Chester T. Harhut

Paul A. Barrett, Esquire.

SUPREME COURT OF PENNSYLVANIA
Eastern District

Charles W.Johns,Esq.
Prothonotary

City Hall
Philadelphia.Pa.19107
(215)560-6370

August 6,1991

Manojkumar D.Patel, Pro se
3152,Kennedy Blvd.
Jersey City,N.J.07306

Re: Manojkumar D.Patel,Petitioner V.
Robert Milgram,M.D.
No. 1118 E.D. ALLOCATUR
DOCKET 1990

Dear Mr. Patel,

THis is to advise you that the following order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter.

* July 30, 1991.

Petition for Reconsideration Denied.

Per Curiam. "

Very truly yours,

Bernice G. LaBoo

Bernice G.laBoo
Chief Clerk

CC; Paul A.Barrett,Esq.
Hon.Chester T.Harbut

SUPREME COURT OF PENNSYLVANIA
Eastern District

Charles W.Johns,Esq.
Prothonotary

City Hall
Philadelphia.Pa.
(215)-560-6370

August 22, 1991

Manoj Kumar D.Patel,
3152, Kennedy Blvd.
Jersey City,N.J.07306

Re: Manojkumar D.Patel, Appellant Vs.
Robert Milgram, M.D.
No. 213 E.D. Appeal Docket 1990

Dear Mr. Patel,

Please be advised that the above captioned matter has been transferred to No. E.D. Alloc. Dkt. 1190.

Since this appeal was taken from the same order as the action at No. 1118 E.D. Alloc. Dkt. 1990, disposition of the petition for allowance of appeal applies to the direct appeal as well.

Very truly yours,

Charles W. Johns

Charles W. Johns
Prothonotary

CC; Paul A. Barrett,Esq.

Citation of Authorities

The plaintiff's right under State Constitution to trial by Jury composed of 12 jurors was violated when trial court permitted case to proceed with 11 jurors.

Const. Art.1 $ 6; Rules Civ.Proc.Rule 1007.1 (a). 42 Pa. C.S.A.

Jury $ 32(2)

Number 12 is implicit in term"Jury" as found in State Constitution and is not subject to change except by way of Constitutional amendement, or pronouncement of State Supreme Court reexaming it's initial interpretations of "Jury Trial" question. Const. Art. 1 $ 6. See Publication Words and Phrases for judicial constructions and definitions.

Jury $ 32 (3)

When civil ligant had made unrelinquished demand for jury of 12, continuing trial after excusing juror, over litigant's objection, violated litigant's State Constitutional right to trial by jury of 12 members. Const. Art.1 $ 6, 42 Pa.C.S.A. $ 5104(b).

The plaintiff had never waived his right of trial by jury of less than 12 members. As such the ground was not waived for a mistrial. Compare Love V. Coca -Cola Bottling Co. 273 Pa.Super.210,216,417 A.2d 242, 245,(1979).

The concept of Juries of twelve in this Commonwealth of Pennsylvania has it's

origin in a document introduced and adopted in Pennsylavania in 1682 by William Penn. and known as " Laws Agreeed Upon in England."

" TRial by Jury " is inextricably linked to the number "12" Given this facts,it is not for the Superior Court, as an intermediate appellate court,to alter established law, regardless of one's argument that the case is dated. Mohn V. hahnemann Medical College and Hosp. 357 Pa. Super. 173,176,515 A.2d 920,922 (1986). Reargument denied Oct,4,1986.

An attempts to limit the Five-Sixths majority verdict to those cases where Counsel agrred to it were defeated. See. 1975 Pennsylvania Senate Legislative Journal at 807--809.

Further more, the cases reviewed by the Superior Court of Pennsylavania have indicated that, in the absence of (Voluntary and independent) Stipulation or consent on the record to receive a verdict of less than the constituted number, the verdict of the Jury is to be considered a nullity. See.e.g. Kardibin V,.Associated Hardware. 204 Pa. Super 586,598-599,426 A.2d 649 655-656 (1981)., See Also Commonweqlth Vs. A.Juvenile,384 Mass. 390,425,N.E.2d.294 (1981).

It is true that in Colgrove, the United Sates Supreme Court on the heels of Wiliiams V. Floria, Supra.found that a 12 member jury trial in a civil cases was not constitutionally mandated by the seventh amendment of the Unites States Constitution.

Unlike Colgrove, at bar we have the Highest State Cpurt interpreting it's State's Constitution to embrace the approbation of 12-persons jury panel.

See Smith, Supra. , Palmer V. Ford Motor Co. 498 F.2d.952,954 (10th Cir. 1974).

As a consequence, we find Colgrove to be unpersuasive, and even if we were to hold otherwise,it has been off-stated that the Courts of the State ascribe greater Constitutional protection to it's citizenry that does its Federal Government.-Counterpart. See E.g.Commonwealth Vs.Beaver,317,Super. Pa. 88, 99, 463 A.2d 1097,1103 (1983).

We do now on the strength of our Supreme Court's decisions cited supra, and by doing so, we affirm over 700 years of English Law Common Law history since the 12 persons jury became established at the end of the reign of Henry II in the 12th century.

Because the trial court has acted inconststantly with established, albeit intaged, a case law in this jurisdiction, we need to reverse and remand for a new trial.

Pa. 1960;

Where only General exception was taken to portion of the court's charge or whole charge, appellate review error of error in charge is limited to basic and fundamental error which misled jury to party litigant;s prejudice. .. Enfield V.Stout, 161 A.2d 22,400 Pa. 6

under a general exceptions to charge, only basic and fundamental erros will be cosidered by Supreme Court. Pa. 1949

Pa. 1936.

Appellate Court may of it's own motion reverse judgement because of basic and fundamental error, even in absence of general exception.
Paterson V.Pittsburgh Rye Co. 185 A.283, 322 Pa. 125.

Court's Inherent Authority:

Pa. Super 1976. Court has inherent authority to determine on it's own motion whether it has jurisdiction to decide cause before it and thus, even if party fails to raise issue of subject matter exception in lower court to consider issue of the subject matter jurisdiction.
Marcus V. Diulus. 363 A 2d 1205,242 Pa. Super 152.

Contributory Negligence:

Pa. Super 1958: Contributory Negligence is plaintiff's Negligence which in some degree helps proximately causing plaintiff's injury.

Pa. 1943: Whether injured person was contributarily negligent depends upon her conduct at a time of injury, and if she acted as reasonably prudent person would have acted under all circumstances,issue of contributory negligence should be resolved in her favor. Weismiller V. Farrell. 34 A.2d 45.

A plaintiff may not found contrubutorily negligent unless it appears that he engaged in conduct that was both negligent and the legal cause of his injury. Fahringer V. Rinehimer, 423 A.2d 731,283 Pa. Super 93.

Pa. 1978:
Once the plaintiff has established facts from which a jury could reasonably conclude that defendent's actions were sustantial factor in bringing about the harm, fact that some other cause concur with the negligence of defendent in producing injury does not relieve defendant from liability unless he can show that such other cause could have produced injury independently of his negligence. Majorsv. Brodhead Hotel. 205,A.2d 873,416 hamil V. Bashline, 392,A2d, 1280, 481 Pa. 256.

Pa. 1938: Defendent's Negligence are concurrent and their liability joint and several, where injury would not have happened but for continuing negligence of the defendant whose negligence first put plaintiff in peril. Coyne V.Pittsburgh Rye Co. 141 A 2d 830, 393 Pa. 326.

If the defendent's negligence concurred with some other than the plaintiff's fault, to produce plaintiff's injury, so that it can clearly appears that but for such negligence injury would not have happened and both circumstances are closely connected with the injury in order of events, defendent is responsible eventhough his negligent act was not the nearest cause in order of the time. Id.
Pa. 1953. Brown V. Ambridge Yellow Cab.Co. 97,A.2d 377,374,Pa. 208.

Pa.1967: Pa. Super 1969.
There may be two or more substantial causes which combines to cause an event and it defendent's negligence was one of them ,plaintiff may recover although no one cause standing alone would have caused

the injuries and /or have produced an injury.
Boushell V. J.H. Beer Inc. 258 A 2d 682 215 Pa. Super 439.

Proximate cause of Accident and Injury to plaintiff:

Proximate cause may be established in most cases by showing that a harm to the plaintiff would not have occurred but for defendant's negligence.
Schenck V. Roger Williams Gen.Hospital. 382 A2d 514.

To recover in a negligence action, plaintiff must prove a legal duty owing to him by defendent, an unintentional breach of such duty by careless conduct, and causal connection between the defendant's conduct and plaintiff's injury, and plaintiff's case must not disclose that he voluntarily assumed the risk or was guilty of contributory negligence.

Pa. 1960 : To make out case of negligece, plaintiff must prove, inter alia, that defendent owed plaintiff a duty which was breached. In Negligence action, plaintiff has burden of proof that the defendant was negligent and that such negligence was a proximate cause of injury.
Crane V. Neal 132 A.2d.675,389 Pa.329.

New Trial: Pa. Super 1939:
In action for inuries, extended examination of witnesses and general attitude of trial judge when placed the plaintiff and her counsel in unfavorable light were sufficient to require new trial notwithstanding that plaintiff made no motion for a

withdrawal of juror and that exception was not taken to every alleged prejudicial remrks, act or ruling of trial judge.

Duffy V. Griffith. 4 A2d, 170, 134,Pa. Super 447.

All these citation and authorities are applicable to the facts of this case at the Bar and to all issues of facts and issues of law are required to resolved in light of these case laws.

Manoj Kumar Patel,
Petitioner.

Supreme Court, U.S.
FILED
MAR 30 1992
OFFICE OF THE CLERK

(2)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO. 91-1465

MANOJ KUMAR D. PATEL,

Petitioner

VS.

ROBERT MILGRAM, M.D.,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION

PAUL A. BARRETT, ESQ.
Attorney for
Respondent
345 Wyoming Avenue
Scranton, PA 18503
(717) 348-3711

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Appendix:

Transcript of Conference Relating to Proceeding with 11 Jurors. . . . 1b

Rules:

14. 10

15.1. 8

Pa. R.C.P. 1007.1(a). 14

42 Pa. C.S.A. 5104. 17

COUNTER-STATEMENT OF THE CASE

Respondent will not counterstate the case beyond what he deems necessary to correct the inaccuracies in Petitioner's statement.

Petitioner's assertions (Pet., 25-26) that the trial judge was insistent that the trial continue with only eleven jurors after it became obvious to all that juror no. 4 was in no condition to continue in service, that the trial judge persuaded Petitioner's counsel to agree to the judge's suggestions, that his counsel misguided him, that Petitioner did not agree to proceeding with eleven jurors, that (Pet., 48) the judge "was only interested to finish this case and wanted to get rid of it, so that he may not have to commute from Reading to Scranton" are, of course, unsupportable and, indeed, refuted by the official transcript of the

proceedings in chambers relating to the excusing of the juror and the agreement to proceed with the remaining eleven jurors. (A certified copy of the transcript is attached as an Appendix.) Any fair reading of that transcript cannot but result in the certainty that the trial judge handled the matter tactfully and with admirable judicial decorum. He first conferred with counsel to confirm that the juror was in fact incapacitated; he called the juror into chambers in the presence of counsel and, after interviewing her for a few minutes, excused her; next, counsel confirmed that they had spoken to their respective clients about whether to proceed with eleven jurors and advised the court that they and their clients were prepared so to proceed; finally, he called into chambers the parties themselves and asked them directly whether they wished to proceed with only eleven jurors and were

agreeable that the votes of ten jurors would constitute the verdict of the jury, and they -- everyone -- so agreed. Petitioner, while pro se, is an attorney and the suggestion that the judge somehow coerced the parties to continue notwithstanding the inability of the one juror to proceed and did so out of considerations of personal convenience is quite unpardonable. In any event, it is false.

No less false are Petitioner's assertions that Respondent's counsel had criminally conspired with Petitioner's treating physicians to the end of getting them to testify falsely at the trial against the interests of Petitioner, their former patient. In point of fact, only after having served a subpoena upon them to testify at the trial of this action did respondent's counsel, on the eve of the

trial, confer with them in regards to their medical treatment of Petitioner. Petitioner had previously given to respondent's counsel a signed medical authorization form which enabled him to obtain Petitioner's records from the physicians and the hospital. Contrary to Petitioner's assertions, respondent's counsel gave to Petitioner prior to trial copies of the records thus obtained.

Petitioner asserts (Pet., 48) that the trial judge failed to select 3 alternate jurors. Of course, the judge selected no jurors; the parties through their counsel selected the jurors. And two alternates, juror no. 25 and juror no. 28, respectively Richard Griggs and Richard Segiel, were chosen but, just before trial got underway, were excused by

agreement, leaving 12 jurors to begin the case.

Petitioner's attacks on the competency of his trial attorney seem to stem from Atty. O'Malley's alleged failure to advise him that he had a right under Pennsylvania law to a jury of twelve persons and therefore could, if he chose, move for a mistrial after juror no 4 was excused from continued service. But the transcript does show Mr. O'Malley advising Petitioner that the alternative to proceeding with the trial before eleven jurors was starting it all over again. Petitioner confirmed Mr. O'Malley's belief that he, Petitioner, did not want to start all over again on some later date before an all new jury. (Plaintiff's expert was on hand, was from New York, and had not "come cheap.")

Petitioner asserts that his treating physicians whom respondent subpoenaed "knowingly gave false testimony . . . to cover up and conceal their own Negligence and Medical Malpractice. . ." (Pet., 23) They did not have to worry about that because the statute of limitations had long since run on Petitioner's claims against them. Petitioner states (Pet. 22) that the case he brought against them and respondent in federal court "is still pending in the U.S. District Court, Scranton, Pa." It is not. Respondent herein was let out of that federal action on grounds of res judicata and an appeal therefrom to the U.S. Court of Appeals for the Third Circuit denied, as was a petition for reconsideration. The federal case against the other defendants has since been decided in their favor, on grounds that the limitations period had

run on Petitioner's claims against them.

Petitioner asserts that the jury's verdict was not unanimous. (Pet., 33) It was. The vote was 11 to 0. Moreover, in Pennsylvania, verdicts of juries in civil cases need not be unanimous. A 5/6ths jury division suffices, as will hereinafter be pointed out. Here, Petitioner stipulated that the votes of 10 of the 11 would constitute the verdict of the jury. All eleven jurors having found that defendant's negligence was not a substantial factor in bringing about plaintiff's complained of harm, a verdict was properly molded in favor of respondent and against Petitioner, to which molded verdict the eleven assented.

Petitioner complains of the trial court's failure to grant a mistrial (Pet., p. 1, 6, 26), incorrectly implying that

such motion was made. None ever was. Indeed, certain of his complaints of ineffective assistance of counsel are to the effect that his attorney, Todd O'Malley, Esq., of Scranton, Pa., "failed to ask the judge to declare a MISTRIAL" (Pet., p. 7) and "failed to object to incapacitated juror's being excused . . . he stipulated on the record to that juror's being excused . . . [and] agreed to proceed with eleven jurors." (Pet., p. 26)

Other numerous perceived misstatements of fact abound, not just in Petitioner's Statement of the Case but throughout. However, they seem to have little, if any, bearing on the question of what issues would properly be before this Court if certiorari were granted (Rule 15, .1) and are accordingly left unchallenged in the belief that the failure to

controvert them does not constitute an assent to their correctness.

SUMMARY OF ARGUMENT AGAINST CERTIORARI

Firstly, jurisdiction is improperly laid. While the Petition seeks certiorari to the Superior Court of Pennsylvania and while, indeed, the judgment sought to be reviewed is one entered in a state court action, Petitioner invokes jurisdiction "pursuant to 28 U.S.C. 1254." (Pet., 11) That provision confers jurisdiction upon this Court of appeals from judgments entered in the United States Courts of Appeals, not state courts.

Secondly, the Petition runs afoul of this Court's Rule 14, specifically subparagraphs .1(h) and .5 thereof. Seeking review of a state court judgment, Petitioner was obligated to specify the stage in the proceedings, both in the trial and state appellate courts, at which federal questions here sought to be reviewed were raised, how he raised them,

and the way they were passed upon, and he was bound as well to set forth such pertinent quotations of specific portions of the record as show that such federal questions were timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. This, respondent submits, has not been done and, notwithstanding Petitioner's pro se status, should not be excused, as Petitioner is an attorney. See Patel v. Sauquoit Fibers Co., 56 Pa. Commonwealth Ct. 279, 424 A.2d 621 (1981). Subparagraph .5 of this Court's Rule 14 provides that the failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying a petition for certiorari. The instant petition not only fails to present what is necessary in that

way but fails to present such federal questions as are suggested in accordance with subparagraph .1(h) at all.

Thirdly, the federal questions now sought to be raised have long since been waived by failure to raise them below. Not until now has Petitioner questioned the manner in which Respondent exercised his peremptory challenges and while, in his motion for post-trial relief, he complained of the trial proceeding before only eleven jurors, the record is clear that not only his counsel but he, himself, personally assented to that. In any event, as will be shown, such federal questions as are suggested are without application to this case.

ADDITIONAL ARGUMENTS FOR DENYING THE PETITION

Petitioners' complaints of deprivation of a state constitutionally secured right to a trial by twelve jurors in this civil action fall under the weight of unrecited facts and controlling law.

First, the Seventh Amendment's right to trial by jury in the federal courts has not been extended to the States through the Fourteenth Amendment. Olesen v. Trust Co. of Chicago, 245 F.2d 522 (7th Cir.), cert. den. 355 U.S. 896, 78 S.Ct. 270, 2 L.Ed.2d 193 (1957). A denial of a jury trial in a state civil proceeding does not violate the due process clause. Wagner Co. v. Lyndon, 262 U.S. 226, 232, 43 S.Ct. 589, 591, 67 L.Ed. 961 (1923). Nor does the equal protection clause require a jury trial in state civil proceedings: Letendre v. Fugate, 701 F.2d 1093, 1094

(4th Cir. 1983), cert. den. 464 U.S. 837, 104 S.Ct. 125, 78 L.Ed.2d 122 (1983).

Secondly, by rule of civil procedure promulgated by the Pennsylvania Supreme Court and at all times pertinent hereto in effect, the right to a jury trial in a civil case is waivable. Pa. R.C.P. 1007.1 (a) provides that:

> "In any action in which the right to jury trial exists, that right shall be deemed waived unless a party files and serves a written demand for a jury trial not later than twenty (20) days after service of the last permissible pleading. The demand shall be made by endorsement on a pleading or by a separate writing."

Thirdly, petitioner did not make such demand. None of the pleadings in the trial court are endorsed with a demand for jury trial. Moreover, no separate

document filed in the trial court ever demanded a jury trial. But for respondent's having inadvertently checked the wrong block in his Certificate of Readiness for Trial when ordering the case onto the trial list (as a result of which it found its way onto the jury trial list), the case would have been heard nonjury.

When respondent, in a conference in chambers on the date fixed for trial, moved to transfer the case to the non-jury list because neither party had made a jury demand in accordance with Pa. R.C.P. 1007.1, petitioner objected, respondent's Certificate of Readiness for Trial was examined, respondent's designation of a jury trial thereon noted, and petitioner's objection to the motion sustained.

Absent waiver, the right of a civil litigant in Pennsylvania to a jury of twelve is not settled. It is suggested by dicta in Smith v. Times Publishing Co., 178 Pa. 481, 36 Atl. 296 (1897) to be guaranteed by Art. 1, Sec. 6, of the Constitution of Pennsylvania and such is the express holding of one of Pennsylvania's intermediate appellate courts: Blum v. Merrell Dow Pharmaceuticals, 385 Pa. Superior Ct. 151, 560 A.2d 212 (1989). But, a petition for allowance of appeal therefrom to the Pennsylvania Supreme Court has been granted: 527 Pa. 614, 590 A.2d 755 (1991) and the matter still pends before the state's highest court.

Pennsylvania law does not require juror unanimity in civil cases. By a 1971 Amendment to the state constitution, that state's General Assembly was empowered to

provide, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. (Pa. Const., Art. 1, Sec. 6) The legislature exercised that authority by providing that "in any civil case a verdict rendered by at least five-sixths of the jury shall be the verdict of the jury and shall have the same effect as a unanimous verdict of the jury." Act of July 9, 1976, P.L. 586, No. 142, as amended, 42 Pa. C.S.A. 5104.

In a civil action wherein, after trial was begun, one of the jurors requested to be excused because his mother had been rushed to the Intensive Care Coronary Unit of a hospital the night before, and wherein the parties stipulated that the trial should proceed with only eleven jurors remaining and that a verdict of nine of the eleven should constitute the verdict of the jury, the trial judge's

refusal to charge the jury that the votes of 10 of the 11 remaining would be required for a valid verdict was affirmed in Kardibin v. Associated Hardware, 282 Pa. Superior Ct. 586, 426 A. 2d 649 (1981), the court concluding that the parties were free to stipulate to a verdict of less than five-sixths. In the instant case, the parties stipulated that the votes of ten of the eleven jurors would constitute a verdict and all eleven found that respondent's negligence was not a substantial factor in bringing about the harm of which plaintiff complained.

Petitioner complains that respondent's "attorney has used a peremptory challnges (sic) to remove the hispanice (sic), black and Asian American potential jurors from jury pool." In point of fact, the "pool" consisted of 40 veniremen. Twelve jurors and two

alternates were to be chosen. Each party was allowed four peremptory challenges. Respondent's attorney's first "strike" was of juror #21, one Mamie Riviello. On voir dire, she revealed that either she or a family member had been a patient of Dr. Friedman, once a co-defendant in this action and the physician with whom the respondent was affiliated at the time of the alleged negligence complained of. The ailment for which Friedman had treated was club feet. Friedman's efforts to correct the condition were unsuccessful. She was stricken because of respondent's fear that she might not be impartial in a malpractice action against Dr. Friedman's associate. The second peremptory challenge was of juror # 33, one Pearl Hannah Willner who, on voir dire, spoke of knowing Dr. Friedman and of being involved as a plaintiff in a medical malpractice case in 1974. Respondent

struck her because he felt that he did not need as a juror a person who had figured as a plaintiff in a previous malpractice case. Respondent's third strike was of juror #26, one Teresa B. Edwards who, on voir dire, stated that her husband was disabled and that either she or he (notes not clear) had had skin grafts. Respondent struck her because there would be much said at trial by plaintiff and his witnesses about his medical disability and because of the juror's exposure to skin grafts. Undue sympathy toward a disabled plaintiff with skin problems was feared and the challenge exercised. Respondent's fourth and last peremptory challenge was of juror #10, one Marykaye A. O'Malley. Her occupation was listed as a nurse's aide and she bore a last name identical to that of Petitioner's trial counsel who is a member of a large O'Malley "clan" in the Scranton area. Respondent was taking no

chances. That is who were stricken and why they were stricken. None of them was of a "cognizable group" respondent was interested in excluding. In particular, none was recognized as Hispanic, Black or Asian American. Thirty-six other persons constituted the jury pool, the last names of whom are, in order, Beagle, Anderson, Rinaldoni, Kareha (the juror who took ill and was excused), Hanley, Toth, Wojciechowski, Stas, O'Gara, Gawrych, Castrogiovanni, Rogan, Murphy, Pliss, Randel, Bird, Dobroski, Kosack, Severe, Harrison, Bowen, Mullisky, Griggs, Portanova, Segiel, Kranick, Smith, Krupka, Furdin, Watkofsky, Jugan, Lapinski, Turner, Singer, McGuigan and Cook. While respondent's counsel does not represent that none of these was either Hispanic, Black or Asian American, he does not remember recognizing any as such and had no occasion to exercise his peremptory

challenges out of the motivation ascribed to him by petitioner. Petitioner's assertion that respondent's peremptory challenges were exercised out of such motivation is a desperate, unfortunate and sad last grasp for a federal question holding feint promise of entree to this Court. In any event it is false.

While respondent recognizes that the use of a peremptory challenge, based on race, of a juror in a civil case pending in federal court for the purpose of excluding cognizable groups from service on petit juries has been held violative of the equal protection rights of the juror and to give rise to a right in the peremptory challenger's opponent to complain thereof [Edmonson v. Leesville Concrete, 500 U.S. __, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991)] and further recognizes that an argument can be made

that the same fate might await a similar use of such peremptory challenges in state courts [although if a right to a jury in a state court civil action is not federally secured, it is difficult to understand how either trying such an action to less than twelve jurors or exercising one's right of peremptory challenge of a juror affects federally secured rights], respondent notes that Thad Edmonson, during voir dire, asked the District Court to require his opponent to articulate a race-neutral explanation for striking two of the panel's three black jurors. In the case at bar, Petitioner at no point prior to his Petition for Certiorari complained of respondent's exercise of his peremptory challenge rights. Surely, Petitioner has waived any right he had to level such a charge. In Pennsylvania, it is a prerequisite to appellate review of even fundamental error that a timely objection

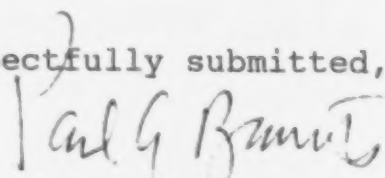
be made and thereafter continually preserved: Reilly by Reilly v. Southeastern Pa. Transp., 507 Pa. 204, 489 A.2d 1291, 1296 (1985):

> "In order to preserve an issue for appeal, a litigant must make a timely, specific objection at trial and must raise the issue on post-trial motions. Issues not preserved for appellate review cannot be considered by an appellate court even though the alleged error involves a basic or fundamental error. . ."

CONCLUSION

For the reasons that this Court's jurisdiction has been improperly invoked, this Court's Rules not adhered to, and the rights sought to be established waived, it is submitted that the Petition for Certiorari should be denied.

Respectfully submitted,



Paul A. Barrett
of O'Malley & Harris, P.C.
345 Wyoming Avenue
Scranton, Pa. 18503

March 30, 1992

CERTIFICATE OF SERVICE

I, Paul A. Barrett, do hereby certify that I served two true and correct copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the Superior Court of Pennsylvania upon Plaintiff by forwarding same via first class mail, postage prepaid, this 30th day of March, 1992, addressed as follows:

Manoj Kumar Patel
3152 Kennedy Blvd.
Jersey City, NJ 07306

Paul A. Barrett

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN CHAMBERS

BY THE COURT: We are now in the retirng room. During the recess it appeared that juror number four, Ellen M. Kareha, 517 Mary Street, Old Forge, Pa., who is listed as thirty-two years of age, may be ill, and because of the illness -- which she has not affirmatively indicated to either a tipstaff or anyone else, to our knowledge -- nevertheless,it appears that she does have some condition which may render her unable to continue her services as a juror in this case. This would mean that we only have eleven jurors if she is excused, and I would appreciate receiving communication of counsel at this time regarding this situation. It would appear that she has been, from time to time, inattentive, at least, from her physical appearance, by tilting her head, and so forth, while in the jury box, and she did have some difficulty in leaving the jury box during the course -- or, at least, at the start -- of this recess. Any comments from counsel?

BY MR. O'MALLEY: I would concur with the court's observation of the juror. I have had an opportunity to observe her, particularly during the cross-examination of Mr. Barrett, and she did appear extremely inattentive, to the point where it appears that she is sleeping, or having difficulty paying attention at all to what's going on.

BY MR. BARRETT: I would indicate, your Honor, that while I haven't been watching her too carefully, I did notice the difficulty she had in removing herself from the courtroom at the recess; as a matter of fact, she would not have made it out of the jury box without the aid of the tipstaff, and I know that I spoke to my client before I came in here, and I specifically asked him if he would be willing to hear this case before a jury of eleven, and he has authorized me to say that he would.

BY THE COURT: Have you had an opportunity to speak with your client, Mr. O'Malley?

BY MR. O'MALLEY: Yes, your Honor. My client feels the same. I think it would be better to have her

excused, too, if the court doesn't have any objection.

BY THE COURT: I assume, then, that the rule that five-sixths of the jury would not necessarily be applicable -- five-sixths of eleven -- but, rather, any jury verdict would require the agreement of ten of the eleven jurors. Do we agree on that, gentlemen?

BY MR. O'MALLEY: Yes, we do, your Honor.

BY MR. BARRETT: In other words, your Honor, we are not changing it at all. In other words, that's what it was before the excusal of this juror, and that's what it remains. In other words, you need ten for a verdict?

BY THE COURT: That's correct. I don't know what five-sixths of eleven would be. We would have to cut somebody in fractions. So is it agreed that any verdict here would require all ten jurors to agree, of the eleven?

BY MR. O'MALLEY: Yes, your Honor.

BY THE COURT: Is that agreeable?

BY MR. BARRETT: I don't know that I've had it before, but, yes, I guess that's agreeable. It's

agreeable, let me put it that way.

BY THE COURT: Is there some other approach, counsel, a suggestion that could be adopted?

BY MR. O'MALLEY: I have none.

BY THE COURT: In other words, we're in the same position as we were before. It requires ten jurors to arrive at a verdict.

BY MR. O'MALLEY: That's correct,your Honor.

BY THE COURT: If we lose another one,then it requires a unanimous verdict unless we reconsider it, but, at this point, it would require ten jurors to agree on a verdict. Is that agreeable with everyone?

BY MR. O'MALLEY: Yes.

BY THE COURT: If we approach it in that direction.

BY MR. O'MALLEY: Yes.

BY THE COURT: All right. I think that we should call the juror into the retiring room here, and I'll inform her that she's excused.

(ELLEN M. KAREHA, Juror #4, is brought into the retiring room.)

BY THE COURT: Let the record show that counsel for the parties are present.

Q BY THE COURT: Are you Ellen M. Kareha?

A Yes.

Q Do you live at 517 Mary Street?

A Yes, I do.

Q Where is that located?

A 517 Mary Street.

Q Is that in the Scranton area?

A Yes.

Q What particular part of Scranton is that in?

A A little bit below Scranton.

Q You appear to be rather tired and dozing off at certain stages of the testimony, and, as a result, it appears that you should be excused from any further service in the case, so you're excused. Everyone is very concerned about your welfare. We have noticed that you had a little difficulty in leaving the jury box, and you may not be feeling well, but whatever your condition is, you are excused, and

you don't have to serve anymore in this case, all right?

A Okay.

Q Thank you very much for coming in. Do you need any help in getting home?

A No.

Q Do you have a car?

A Yes.

Q Are you able to drive?

A Yes.

Q If you're ill, or need any help at all, we will notify the tipstaff because we are all concerned about your condition.

A No, I'm able to drive.

Q Are you feeling all right?

A Yes.

BY THE COURT: THank you.

(The juror is excused.)

+ + +

(Mr. Patel and Dr Milgram are brought into the retiring room.)

* * *

BY THE COURT: Let the record show that counsel are present in the retiring room along with the plaintiff and defendant. My understanding is that counsel have explained to the parties the situation involving the juror, who is Juror No. 4. Ellen M.Kareha. We have excused her from any further service by reason of her condition. It appears that she is suffering from some type of illness, and as a result this means that we only have eleven jurors. Because of the fact that we have eleven jurors this means that a unanimous verdict is not required in Pennsylvania in a civil case. If we had twelve jurors a verdict of ten jurors would be sufficient to return a verdict, or five-sixths. Since now we only have eleven, my understanding is that counsel have agreed that a verdict of a jury of ten jurors will be regarded as the verdict of the jury, the same as a unanimous verdict of twelve. Is that agreeable, and is there any question as far as the parties are concerned?

BY MR. O'MALLEY (to Mr. Patel): Do you understand?

BY THE COURT: Mr. Patel,do you understand?

BY MR. PATEL, Plaintiff: Yes.

BY MR. O'MALLEY: The alternative would be to declare this trial void and start all over again, and I don't think you want that.

BY MR. PATEL: No.

BY THE COURT: Is that agreeable with the doctor?

BY DR. MILGRAM: My understanding is the same, and I also agree.

BY THE COURT: Just so we understand, we all agree that a verdict of ten will be the verdict of the jury.

BY MR. O'MALLEY: Yes.

BY MR. BARRETT: Yes, sir.

BY THE COURT: All right.

+ + +

I HEREBY CERTIFY that the proceedings in chambers in the above case are contained in the shorthand notes taken by me, and that the foregoing is a transcript of said notes.

/s/ Jennifer Guidi

Jennifer Guidi, Official Stenographer.